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8 UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
10 SAN JOSE DIVISION

11 SEB INVESTMENT MANAGEMENT AB,
12 Individually and on Behalf of All Others Similarly
Situated,

13 Plaintiff,

14 v.

15 ALIGN TECHNOLOGY, INC., JOSEPH M.
16 HOGAN, and JOHN F. MORICI,

17 Defendants.

Case No. 5:18-cv-06720-LHK

CLASS ACTION

~~PROPOSED~~ PROTECTIVE ORDER FOR
STANDARD LITIGATION

Judge: Hon. Lucy H. Koh

Re: Dkt. No. 168

1. PURPOSES AND LIMITATIONS

Disclosure and discovery activity in this action are likely to involve production of confidential, proprietary, or private information for which special protection from public disclosure and from use for any purpose other than prosecuting this litigation may be warranted. Accordingly, Lead Plaintiff hereby petitions the Court to enter the following Protective Order. The Order does not confer blanket protections on all disclosures or responses to discovery, and that the protection it affords from public disclosure and use extends only to the limited information or items that are entitled to confidential treatment under the applicable legal principles. As set forth in Section 12.3, below, this Protective Order does not entitle the parties to file confidential information under seal; Civil Local Rule 79-5 sets forth the procedures that must be followed and the standards that will be applied when a party seeks permission from the court to file material under seal.

2. DEFINITIONS

2.1 Challenging Party: a Party or Non-Party that challenges the designation of information or items under this Order.

2.2 “CONFIDENTIAL” Information or Items: information (regardless of how it is generated, stored or maintained) or tangible things that qualify for protection under Federal Rule of Civil Procedure 26(c).

2.3 Counsel (without qualifier): Outside Counsel of Record and In-House Counsel (as well as their support staff).

2.4 Designating Party: a Party or Non-Party that designates information or items that it produces in disclosures or in responses to discovery as “CONFIDENTIAL.”

2.5 Discovery Material: all items or information, regardless of the medium or manner in which it is generated, stored, or maintained (including, among other things, testimony, transcripts, and tangible things), that are produced or generated in disclosures or responses to discovery in this matter.

2.6 Expert: a person with specialized knowledge or experience in a matter pertinent to the litigation who has been retained by a Party or its counsel to serve as an expert witness or as a consultant in this action.

2.7 In-House Counsel: attorneys who are employees of a Party to this action. In-House Counsel does not include Outside Counsel of Record or any other outside counsel.

2.8 Non-Party: any natural person, partnership, corporation, association, or other legal entity not named as a Party to this action.

2.9 Outside Counsel of Record: attorneys who are not employees of a party to this action but are retained to represent or advise a party to this action and have appeared in this action on behalf of that party or are affiliated with a law firm which has appeared on behalf of that party.

2.10 Party: any party to this action, including all of its officers, directors, employees, consultants, retained experts, and Outside Counsel of Record (and their support staffs).

2.11 Producing Party: a Party or Non-Party that produces Discovery Material in this action.

2.12 Professional Vendors: persons or entities that provide litigation support services (e.g., photocopying, videotaping, translating, preparing exhibits or demonstrations, and organizing, storing, or retrieving data in any form or medium) and their employees and subcontractors.

2.13 Protected Material: any Discovery Material that is designated as "CONFIDENTIAL."

2.14 Receiving Party: a Party that receives Discovery Material from a Producing Party.

3. SCOPE

The protections conferred by this Order cover not only Protected Material (as defined above), but also (1) any information copied or extracted from Protected Material; (2) all copies, excerpts, summaries, or compilations of Protected Material; and (3) any testimony, conversations, or presentations by Parties or their Counsel that might reveal Protected Material. However, the protections conferred by this Order do not cover the following information: (a) any information that is in the public domain at the time of disclosure to a Receiving Party or becomes part of the public domain after its disclosure to a Receiving Party as a result of publication not involving a violation of this Order, including becoming part of the public record through trial or otherwise; and (b) any information known to the Receiving Party prior to the disclosure or obtained by the Receiving Party after the disclosure from a source who obtained the information lawfully and under no obligation of confidentiality to the Designating Party. Any use of Protected Material at trial shall be governed by a separate agreement or order.

1 4. DURATION

2 Even after final disposition of this litigation, the confidentiality obligations imposed by this Order
 3 shall remain in effect until a Designating Party agrees otherwise in writing or a court order otherwise
 4 directs. Final disposition shall be deemed to be the later of (1) dismissal of all claims and defenses in this
 5 action, with or without prejudice; and (2) final judgment herein after the completion and exhaustion of all
 6 appeals, rehearings, remands, trials, or reviews of this action, including the time limits for filing any
 7 motions or applications for extension of time pursuant to applicable law.

8 5. DESIGNATING PROTECTED MATERIAL

9 5.1 Exercise of Restraint and Care in Designating Material for Protection. Each Party or Non-
 10 Party that designates information or items for protection under this Order must take care to limit any such
 11 designation to specific material that qualifies under the appropriate standards. The Designating Party must
 12 designate for protection only those parts of the materials, documents, items, or oral or written
 13 communications that qualify—so that other portions of the material, documents, items, or communications
 14 for which protection is not warranted are not swept unjustifiably within the ambit of this Order.

15 Mass, indiscriminate, or routinized designations are prohibited. Designations that are shown to be
 16 clearly unjustified or that have been made for an improper purpose (e.g., to unnecessarily encumber or
 17 impede the case development process or to impose unnecessary expenses and burdens on other parties)
 18 expose the Designating Party to sanctions.

19 If it comes to a Designating Party's attention that information or items that it designated for
 20 protection do not qualify for protection, that Designating Party must promptly notify all other Parties that
 21 it is withdrawing the mistaken designation.

22 5.2 Manner and Timing of Designations. Except as otherwise provided in this Order (see, e.g.,
 23 second paragraph of section 5.2(a) below), or as otherwise stipulated or ordered, Discovery Material that
 24 a Designating Party believes qualifies for protection under this Order must be clearly so designated before
 25 the material is disclosed or produced.

26 Designation in conformity with this Order requires:

27 (a) For information in documentary form (e.g., paper or electronic documents, but
 28 excluding transcripts of depositions or other pretrial or trial proceedings), the Producing Party shall affix

1 the legend “CONFIDENTIAL” to each page that contains protected material. If only a portion or portions
2 of the material on a page qualifies for protection, the Producing Party also must clearly identify the
3 protected portion(s) (e.g., by making appropriate markings in the margins). For information in
4 documentary form produced in its electronic native format, the Producing Party shall produce such
5 information with a one-page TIFF placeholder to which the Producing Party shall affix the legend
6 “CONFIDENTIAL” to the extent the information includes Protected Material. The Parties agree to confer
7 regarding alternative reasonable methods should this format prove unreasonable for designating certain
8 Protected Materials produced in electronic native format.

9 A Party or Non-Party that makes original documents or materials available for inspection need not
10 designate them for protection until after the inspecting Party has indicated which material it would like
11 copied and produced. During the inspection and before the designation, all of the material made available
12 for inspection shall be deemed “CONFIDENTIAL.” After the inspecting Party has identified the
13 documents it wants copied and produced, the Producing Party must determine which documents, or
14 portions thereof, qualify for protection under this Order. Then, before producing the specified documents,
15 the Producing Party must affix the “CONFIDENTIAL” legend to each page that contains Protected
16 Material. If only a portion or portions of the material on a page qualifies for protection, the Producing Party
17 also must clearly identify the protected portion(s) (e.g., by making appropriate markings in the margins).

18 (b) For testimony given in deposition a Designating Party may have up to 30 days
19 following receipt of the final transcript to identify any specific portion(s) of the testimony as to which
20 protection from disclosure is sought. Until the end of that 30-day period, the entire transcript shall be
21 treated as CONFIDENTIAL. The use of a document as an exhibit at a deposition shall not in any way
22 affect its designation as CONFIDENTIAL.

23 (c) For information produced in some form other than documentary and for any other
24 tangible items, the Producing Party shall affix in a prominent place on the exterior of the container or
25 containers in which the information or item is stored the legend “CONFIDENTIAL.” If only a portion or
26 portions of the information or item warrant protection, the Producing Party, to the extent practicable, shall
27 identify the protected portion(s).

5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to designate qualified information or items does not, standing alone, waive the Designating Party's right to secure protection under this Order for such material. Upon timely correction of a designation, the Receiving Party must make reasonable efforts to assure that the material is treated in accordance with the provisions of this Order.

6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

6.1 Timing of Challenges. Any Party or Non-Party may challenge a designation of confidentiality at any time. Unless a prompt challenge to a Designating Party's confidentiality designation is necessary to avoid foreseeable, substantial unfairness, unnecessary economic burdens, or a significant disruption or delay of the litigation, a Party does not waive its right to challenge a confidentiality designation by electing not to mount a challenge promptly after the original designation is disclosed.

6.2 Meet and Confer. The Challenging Party shall initiate the dispute resolution process by providing written notice of each designation it is challenging and describing the basis for each challenge. To avoid ambiguity as to whether a challenge has been made, the written notice must recite that the challenge to confidentiality is being made in accordance with this specific paragraph of the Protective Order. The parties shall attempt to resolve each challenge in good faith and must begin the process by conferring directly (in voice to voice dialogue; other forms of communication are not sufficient) within 14 days of the date of service of notice. In conferring, the Challenging Party must explain the basis for its belief that the confidentiality designation was not proper and must give the Designating Party an opportunity to review the designated material, to reconsider the circumstances, and, if no change in designation is offered, to explain the basis for the chosen designation. A Challenging Party may proceed to the next stage of the challenge process only if it has engaged in this meet and confer process first or establishes that the Designating Party is unwilling to participate in the meet and confer process in a timely manner.

6.3 Judicial Intervention. If the parties cannot resolve a challenge without court intervention, they shall comply with the discovery dispute procedure outlined in Judge DeMarchi's Standing Order for Civil Cases (and in compliance with Civ. L.R. 79-5, if applicable). Failure by the parties to seek court intervention within the period set out in Judge DeMarchi's Standing Order for Civil Cases shall

1 automatically waive the confidentiality designation for each challenged designation. In addition, the
 2 Challenging Party may seek relief with respect to challenging a confidentiality designation at any time if
 3 there is good cause for doing so, including a challenge to the designation of a deposition transcript or any
 4 portions thereof. In any discovery letter brief filed pursuant to this provision, the parties shall attest that
 5 they have complied with the meet and confer requirements imposed by the preceding paragraph and
 6 Judge DeMarchi's Standing Order for Civil Cases.

7 The burden of persuasion in any such challenge proceeding shall be on the Designating Party.
 8 Frivolous challenges, and those made for an improper purpose (e.g., to harass or impose unnecessary
 9 expenses and burdens on other parties) may expose the Challenging Party to sanctions. Unless the
 10 Designating Party has waived the confidentiality designation by failing to seek court intervention as
 11 described above, all parties shall continue to afford the material in question the level of protection to which
 12 it is entitled under the Producing Party's designation until the court rules on the challenge.

13 7. ACCESS TO AND USE OF PROTECTED MATERIAL

14 7.1 Basic Principles. A Receiving Party may use Protected Material that is disclosed or
 15 produced by another Party or by a Non-Party in connection with this case only for prosecuting, defending,
 16 or attempting to settle this litigation. Such Protected Material may be disclosed only to the categories of
 17 persons and under the conditions described in this Order. When the litigation has been terminated, a
 18 Receiving Party must comply with the provisions of section 13 below (FINAL DISPOSITION).

19 Protected Material must be stored and maintained by a Receiving Party at a location and in a secure
 20 manner that ensures that access is limited to the persons authorized under this Order.

21 7.2 Disclosure of "CONFIDENTIAL" Information or Items. Unless otherwise ordered by the
 22 court or permitted in writing by the Designating Party, a Receiving Party may disclose any information or
 23 item designated "CONFIDENTIAL" only to:

24 (a) the Receiving Party's Outside Counsel of Record in this action, and regular or
 25 temporary employees and Professional Vendors of such Counsel (including outside copying and litigation
 26 support services) assisting in the conduct of the Action, for use in accordance with this Protective Order;
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1 (b) the authorized representatives (including In-House Counsel) of the Parties who are
 2 assisting Counsel in the Action and who have signed the “Acknowledgment and Agreement to Be Bound”
 3 (Exhibit A);

4 (c) Experts (as defined in this Order) of a Party and their personnel who are assisting
 5 Counsel in the Action and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit
 6 A), provided that no Discovery Material designated CONFIDENTIAL may be disclosed to any Expert or
 7 their personnel where the Expert, at the time of his or her potential retention in this Action, is currently,
 8 or is engaged in any discussions to be in the future, retained as an employee, consultant, or advisor of:
 9 3Shape A/S (including any subsidiaries or affiliated entities); Angelalign Technology Inc. (including
 10 Shanghai EA Medical Instruments Co., Ltd., Shuyang EA Medical Instruments Co., Ltd., Wuxi EA
 11 Medical Instruments Technologies Limited); Candid Care Co.; Carestream Dental; Dentsply Sirona Inc.
 12 (including OraMetrix, Inc. and Straight Smile, LLC); Envista Holdings Corp. (including entities related
 13 to Ormco, KaVo Kerr, and Nobel Biocare branded products); Henry Schein, Inc.; Medit Corp.; Shanghai
 14 Smartee Denti-Technology Co., Ltd.; SmileDirectClub, Inc. (including Access Dental Lab, LLC, SDC
 15 U.S. SmilePay SPV, SDC Financial, and SDC Holding, LLC); Straumann Holding AG (including Bay
 16 Materials, ClearCorrect, DrSmile, Geniova, Smyletec, and Yllor); The 3M Company (if responsibilities
 17 relate in any way to the Clarity product); uLab Systems Inc.; and Zenyum Pte. Ltd., except by written
 18 agreement of the Parties or by order of the Court and any appellate court. If any Expert of a Party is
 19 subsequently retained as an employee, consultant, or advisor of any of the entities listed above during the
 20 pendency of this Action, the Party who has retained such Expert will promptly notify the Designating
 21 Party. The Parties shall confer and bring any disputes to the Court.

22 (d) the Court, or any other federal district or appellate court that may have jurisdiction
 23 to decide issues in the Action, and its personnel;

24 (e) court reporters and videographers and their respective staff members engaged in
 25 connection with this Action;

26 (f) professional jury or trial consultants (and their staff), or mock jurors who are
 27 assisting Counsel for a Party and have signed the “Acknowledgment and Agreement to Be Bound”
 28 (Exhibit A);

(g) any mediator or settlement officer, and their supporting personnel, mutually agreed upon by any of the Parties engaged in settlement discussions and who have signed the “Acknowledgement and Agreement to Be Bound” (Exhibit A);

(h) insurers and reinsurers of the Parties, and counsel for such insurers or reinsurers, who have signed the “Acknowledgement and Agreement to Be Bound” (Exhibit A);

(i) during their depositions, witnesses in the Action to whom disclosure is reasonably necessary and who have signed the “Acknowledgement and Agreement to Be Bound” (Exhibit A), unless otherwise agreed by the Designating Party or ordered by the Court;

(j) the custodian, author, or recipient of a document containing the information or a person who otherwise possessed or knew the information.

8. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER LITIGATION

If a Party is served with a subpoena or a court order issued in other litigation that compels disclosure of any information or items designated in this action as “CONFIDENTIAL,” that Party must:

(a) promptly notify in writing the Designating Party. Such notification shall include a copy of the subpoena or court order;

(b) promptly notify in writing the party who caused the subpoena or order to issue in the other litigation that some or all of the material covered by the subpoena or order is subject to this Protective Order. Such notification shall include a copy of this Protective Order; and

(c) cooperate with respect to all reasonable procedures sought to be pursued by the Designating Party whose Protected Material may be affected.

If the Designating Party timely seeks a protective order, the party served with the subpoena or court order shall not produce any information designated in this action as “CONFIDENTIAL” before a determination by the court from which the subpoena or order issued, unless the party has obtained the Designating Party’s permission. The Designating Party shall bear the burden and expense of seeking protection in that court of its confidential material—and nothing in these provisions should be construed as authorizing or encouraging a Receiving Party in this action to disobey a lawful directive from another court.

9. A NON-PARTY’S PROTECTED MATERIAL SOUGHT TO BE PRODUCED IN THIS LITIGATION

(a) The terms of this Order are applicable to information produced by a Non-Party in this action and designated as “CONFIDENTIAL.” Such information produced by Non-Parties in connection with this litigation is protected by the remedies and relief provided by this Order. Nothing in these provisions should be construed as prohibiting a Non-Party from seeking additional protections.

(b) In the event that a Party is required, by a valid discovery request, to produce a Non-Party’s confidential information in its possession, and the Party is subject to an agreement with the Non-Party not to produce the Non-Party’s confidential information, then the Party shall:

(1) promptly notify in writing the Requesting Party and the Non-Party that some or all of the information requested is subject to a confidentiality agreement with a Non-Party;

(2) promptly provide the Non-Party with a copy of the Protective Order in this litigation, the relevant discovery request(s), and a reasonably specific description of the information requested; and

(3) make the information requested available for inspection by the Non-Party.

(c) If the Non-Party fails to object or seek a protective order from this court within 14 days of receiving the notice and accompanying information, the Receiving Party may produce the Non-Party’s confidential information responsive to the discovery request. If the Non-Party timely seeks a protective order, the Receiving Party shall not produce any information in its possession or control that is subject to the confidentiality agreement with the Non-Party before a determination by the court. Absent a court order to the contrary, the Non-Party shall bear the burden and expense of seeking protection in this court of its confidential information.

10. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed Protected Material to any person or in any circumstance not authorized under this Protective Order, the Receiving Party must immediately (a) notify in writing the Designating Party of the unauthorized disclosures, (b) use its best efforts to retrieve all unauthorized copies of the Protected Material, (c) inform the person or persons to whom unauthorized disclosures were made of all the terms of this Order, and (d) request such person or

persons to execute the “Acknowledgment and Agreement to Be Bound” that is attached hereto as Exhibit A. Unauthorized or inadvertent disclosure does not change the confidential status of Discovery Material or waive the right to hold the disclosed document or information as Protected Material. Any disputes concerning the unauthorized disclosure of Protected Material are subject to Judge DeMarchi’s Standing Order for Civil Cases.

11. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE PROTECTED MATERIAL

In the event that a Producing Party believes in good faith that Discovery Materials subject to a valid claim of attorney-client privilege or work-product protection has been produced inadvertently, the Producing Party shall notify the Receiving Party in writing within five (5) business days after so learning or discovering that such production has been made and the basis for claiming such disclosure was inadvertent. When a Producing Party gives notice to Receiving Parties that certain inadvertently produced material is subject to a claim of privilege or other protection, the obligations of the Receiving Parties are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B). Any disputes concerning any Discovery Material identified pursuant to this section are subject to Judge DeMarchi’s Standing Order for Civil Cases. This provision is not intended to modify whatever procedure may be established in an e-discovery order that provides for production without prior privilege review. Pursuant to Federal Rule of Evidence 502(d) and (e), insofar as the parties reach an agreement on the effect of disclosure of a communication or information covered by the attorney-client privilege or work-product protection, the parties may incorporate their agreement in the protective order submitted to the court.

12. MISCELLANEOUS

12.1 Right to Further Relief. Nothing in this Protective Order abridges the right of any person to seek its modification by the court in the future.

12.2 Right to Assert Other Objections. By entry of this Protective Order, no Party waives any right it otherwise would have to object to disclosing or producing any information or item on any ground not addressed in this Protective Order. Similarly, no Party waives any right to object on any ground to use in evidence of any of the material covered by this Protective Order.

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Filing Protected Material. Without written permission from the Designating Party or a court order secured after appropriate notice to all interested persons, a Party may not file in the public record in this action any Protected Material. A Party that seeks to file under seal any Protected Material must comply with Civil Local Rule 79-5. Protected Material may only be filed under seal pursuant to a court order authorizing the sealing of the specific Protected Material at issue. Pursuant to Civil Local Rule 79-5, a sealing order will issue only upon a request establishing that the Protected Material at issue is privileged, protectable as a trade secret, or otherwise entitled to protection under the law. If a Receiving Party's request to file Protected Material under seal pursuant to Civil Local Rule 79-5(d) is denied by the court, then the Receiving Party may file the information in the public record pursuant to Civil Local Rule 79-5(f)(2) unless otherwise instructed by the court.

13. FINAL DISPOSITION

Within 60 days after the final disposition of this action, as defined in paragraph 4, each Receiving Party must use reasonable efforts to return all Protected Material to the Producing Party or destroy such material. The Receiving Party's reasonable efforts shall not require the return or destruction of Protected Material that is subject to legal hold obligations. Backup storage media will not be restored for purposes of returning or certifying destruction of Protected Material after the final disposition of this action, but such retained information shall continue to be treated in accordance with the Order. As used in this subdivision, "all Protected Material" includes all copies, abstracts, compilations, summaries, and any other format reproducing or capturing any of the Protected Material. Notwithstanding this provision, Counsel are entitled to retain archival copies of all pleadings, motion papers, trial, deposition and hearing transcripts, legal memoranda, correspondence, deposition and trial exhibits, expert reports, attorney work product, and consultant and expert work product, even if such materials contain Protected Material. Any such archival copies that contain or constitute Protected Material remain subject to this Protective Order as set forth in Section 4 (DURATION).

IT IS SO ORDERED.

DATED: April 7, 2021



Hon. Virginia K. DeMarchi
United States Magistrate Judge

EXHIBIT AACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, _____ [print or type full name], of _____ [print or type full address], declare under penalty of perjury that I have read in its entirety and understand the Protective Order that was issued by the United States District Court for the Northern District of California on [date] in the case of *SEB Investment Management AB v. Align Technology, Inc.*, Case No. 5:18-cv-06720-LHK. I agree to comply with and to be bound by all the terms of this Protective Order and I understand and acknowledge that failure to so comply could expose me to sanctions and punishment in the nature of contempt. I solemnly promise that I will not disclose in any manner any information or item that is subject to this Protective Order to any person or entity except in strict compliance with the provisions of this Order. I further solemnly promise not to use Protected Material for any purpose other than with respect to this litigation.

I further agree to submit to the jurisdiction of the United States District Court for the Northern District of California for the purpose of enforcing the terms of this Protective Order, even if such enforcement proceedings occur after termination of this action.

I hereby appoint _____ [print or type full name] of _____ [print or type full address and telephone number] as my California agent for service of process in connection with this action or any proceedings related to enforcement of this Protective Order.

Date: _____

City and State where sworn and signed: _____

Printed name: _____

Signature: _____